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In The

Supreme Court of the United States

October Term, A.D. 1970

No. 6444

MARY B. KOSHIOL,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner Mary B. Koshiol prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois affirming her conviction of attempt murder and sentence to the Illinois Women's Reformatory.

REFERENCE TO REPORTS OF OPINIONS.

People v. *Koshiol*, 45 Ill. 2d 573, 262 N.E. 2d 446, is attached as an Appendix.

STATEMENT OF JURISDICTIONAL GROUNDS.

The judgment of the Supreme Court of Illinois was entered on May 20, 1970. A timely petition for rehearing filed on June 9, 1970, was denied on October 6, 1970.

Jurisdiction of this Court is invoked under Title 28, USC, sec. 1257 (3).

QUESTIONS PRESENTED FOR REVIEW.

1. Pursuant to directions of the investigating officer, the complainant had his sister search the apartment jointly occupied by petitioner (his wife) and himself. Two small bottles were seized by complainant's sister from petitioner's bedroom dresser drawer, and turned over to the investigating officer at her home. The petitioner was in custody at that time. One of the bottles contained a liquid in which was a trace of arsenic. The two bottles were admitted in evidence over objection.

Questions presented are:

(a) In a State prosecution for aggravated battery and attempt murder of her spouse by poisoning, is evidence obtained from petitioner's bedroom dresser drawer, without her consent and while she was in custody, admissible in evidence when seized by her sister-in-law pursuant to directions of the investigating officer?

(b) Whether one spouse has authority to bind the absent spouse by waiving a legal warrant and agreeing or consenting to an unauthorized search of premises jointly occupied by both?

(c) Where one spouse is the complaining witness against the other, may the complaining spouse waive the Fourth Amendment rights of the absent spouse?

2. In the trial of a two count indictment charging Aggravated Battery and Attempt Murder by administering poison, the Aggravated Battery charge was dismissed after the State rested its case. Petitioner denied administering or attempting to administer poison to the complainant. There was no evidence as to what constituted a fatal dose of arsenic trioxide. Without regard to the integrity of the State's Exhibits, none contained a fatal amount of arsenic trioxide.

Questions presented are:

(a) Whether it is a denial of due process of law to convict the accused in a trial in which there was literally no evidence of one of the elements necessary to constitute the offense charged?

(b) Where there is evidence from which it can be inferred that the accused intended to make the complainant ill, but not to kill the complainant, must the accused be acquitted of the offense of attempt murder which has as a prerequisite element the specific intent to kill?

3. A State expert in blood disorders testified that a person could ingest one to two milligrams of arsenic trioxide every day of his life without it being fatal. Ten times during argument the prosecutors misquoted their one and only witness on the subject and told the jury that one to two milligrams of arsenic trioxide would be fatal.

Questions presented are:

(a) Whether prosecutorial statements of fact not based upon the evidence violates the Due Process Clause of the Fourteenth Amendment?

(b) Whether the accused's right of confrontation under the Sixth Amendment is violated where the evidence adduced at trial is repeatedly misquoted by the prosecutors during argument to the jury?

4. In a trial for Attempt Murder, the gist of which is the specific intent to kill, the jury was given an instruction over objection on a subsection of the Murder statute, defining conduct that, lacking actual intent to kill, involved knowledge of the probability that the offender's acts would cause death or great bodily harm.

Questions presented are:

(a) Is it a denial of the accused's right to a fair trial by an impartial jury to instruct the jury over objection on the definition of an offense not charged?

(b) In a trial for an offense the gist of which is the specific intent to kill, does the giving of an instruction over objection defining a separate and distinct offense not charged in the indictment that involves a less culpable mental state, deny the accused the Sixth Amendment right to trial by an impartial jury?

(c) Does such an instruction deny the accused a fair trial under the Due Process Clause of the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS INVOLVED.

Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a • • • trial, by an impartial jury • • • to be confronted with the witnesses against him • • •.

Fourteenth Amendment:

• • • nor shall any State deprive any person of • • • liberty • • • without due process of law • • •.

STATUTES INVOLVED.

Illinois Revised Statutes, Chapter 38:

12-4. *Aggravated Battery*

• • • • •

(c) A person who administers to an individual or causes him to take, without his consent or by threat or deception, and for other than medical purposes, any • • •, poisonous, • • • substance commits aggravated battery and shall be imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 5 years.

S—4. § 2-4. *Attempt.*) (a) Elements of the Offense.

A person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense.

(b) Impossibility.

It shall not be a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the offense attempted.

(c) Penalty.

• • • • •

(1) the penalty for attempt to commit • • • murder • • • shall not exceed imprisonment for 20 years.

• • • • •

Count 2 of Indictment No. 66-1971:

The Grand Jurors chosen, selected, and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid present that on May 24th, 1966, at and within said County Mary B. Koshiol committed the offense of attempt, in that she, on or about the date heretofore set forth and for some time prior thereto, with the intent to commit the offense of murder, intentionally and knowingly attempted to kill John Koshiol without lawful justification, by administering to said John Koshiol and causing him to take, without his consent, a deadly poison, a more complete and accurate description of which is to the Grand Jurors unknown, in violation of Chapter 38, Section 8-4, of the Illinois Revised Statutes 1965, contrary to the Statute, and against the peace and dignity of the same People of the State of Illinois.

/s/ Daniel P. Ward
State's Attorney

STATEMENT OF THE CASE.

Petitioner Mary Koshiol was charged in a two count indictment with Aggravated Battery and Attempt Murder of her husband John Koshiol by arsenic poisoning. (A. 2-3) Count 1, Aggravated Battery, was dismissed at the close of the State's case. (A. 148, 150) She was convicted of Attempt Murder. (A. 230) There is no evidence in the record as to what constitutes a fatal dose of arsenic.

On March 8, 1966, at the Veteran's Administration Hospital in Chicago, the complainant was treated by one Dr. Pierre, an expert in blood disorders, who took a history of the complainant (A. 57) and diagnosed that the complainant was suffering from chronic arsenic intoxication. (A. 58)

Pursuant to directions of the investigating detective (A. 8, 13) the complainant had his sister search the apartment occupied by petitioner and himself. Two small bottles were seized by complainant's sister from petitioner's bedroom dresser drawer. (A. 15, 16) She turned them over to the investigating detective at her home. (A. 5, 6, 19) Petitioner was in custody at that time. (A. 11) The two small bottles were subjected to chemical and spectrographic tests. (A. 119) In the opinion of a Crime Laboratory technician one contained a liquid in which was arsenic (A. 120) of an unmeasurable amount. (A. 123) The other contained no heavy metals. (A. 120) The two exhibits were admitted into evidence over objection. (A. 20, 21, 148, 149)

After March 12, 1966, all edibles brought to the complainant in the Veteran's Administration Hospital by his

wife (the petitioner) were saved for analysis. (A. 95, 96) Most of the items were tested with negative results. (A. 135, 136)

Only three State Exhibits were shown to contain any measurable amount of arsenic metallic: People's Exhibit 12, a milkshake, contained 4 milligrams (A. 132); People's Exhibit 9, a milkshake, contained 18.2 milligrams (A. 133); and People's Exhibit 11, an orange, contained 1.37 milligrams. (A. 133, 134) The State toxicologist testified that his measurements were for arsenic metallic, which converts into arsenic trioxide by multiplying the amount found by 2.5. (A. 132, 133, 134)

The amount of arsenic trioxide would therefore be 10 milligrams in one milkshake, 45.5 milligrams in another milkshake, and 3.425 milligrams in the orange.

Regarding the compound arsenic trioxide, Dr. Pierre testified that "the dose that a person could take each day without it being fatal—would be between one and two milligrams per day, on a continuance basis." (A. 58, 59)

Dr. Pierre also testified that in preparing to testify as a forensic hematologist he read several medical texts on the subject of arsenic poisoning. (A. 60) One of the authorities that he studied was Goodman & Gilman "The Pharmacological Basis of Therapeutics." (A. 60) That authority hold that 100 milligrams or more is a fatal dose. (p. 741)

Ten times during final arguments the prosecutors told the jury that Dr. Pierre testified that one to two milligrams of arsenic trioxide is a fatal dose. (A. 173, 174, 177, 179, 215, 220, 221, 223) Of course he had testified to no such thing. (A. 58, 59)

The jury found petitioner guilty of attempt murder. (A. 230) The court sentenced petitioner to not less than 2 nor more than 6 years in the Women's Prison at Dwight, Illinois. (A. 230)

On appeal to the Supreme Court of Illinois petitioner argued:

1. that Fourth Amendment rights are personal rights which only the possessor could waive by word or deed, either directly or through an agent; that petitioner had not waived directly and that the items complained of were seized by agents of the police and not of the petitioner. (Br. 12-13)

2. that there was no evidence as to what constituted a fatal dose of arsenic trioxide; that therefore there was no evidence from which a specific intent to kill could be inferred; that specific intent could not be inferred from nothing; that all the medical authorities hold that a fatal dose of arsenic trioxide is 100 milligrams or more; that none of the three State's Exhibits contained a fatal dose from which specific intent to kill could be inferred; that to convict the petitioner without evidence of a specific intent to kill which is the gist of the offense of attempt murder is a denial of due process of law. (Br. 18-19, Reply Br. 5, Pet. Reh. 2-5)

3. that it was reversible error for the prosecutors during argument to the jury to make statements of fact not based upon the evidence; that they misquoted their own forensic hematologist ten times and told the jury that one to two milligrams of arsenic trioxide is a fatal dose. (Br. 19-22, Reply Br. 8-10, Pet. Reh. 9-10)

4. that the petitioner was denied a fair trial by the court giving an instruction over objection that defined

the offense of Murder in terms of general intent because the gist of the offense of Attempt Murder is the specific intent to kill. (Br. 24-25, Reply Br. 10-11, Pet. Reh. 5-8)

The Supreme Court of Illinois affirmed. Petition for rehearing was denied. The mandate has been stayed until this Court rules upon this instant petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT.

Petitioner's Fourth Amendment rights were violated. She was not proven guilty beyond a reasonable doubt. One of the elements of the offense has literally no evidentiary support. She was denied a fair trial by the prosecutors repeatedly arguing facts not proved. The jury was improperly instructed.

Controlling decisions of this Court and of its own were ignored by the court below.

1.

THE PETITIONER'S FOURTH AMENDMENT RIGHTS AGAINST UNREASONABLE SEARCHES AND SEIZURES WERE VIOLATED.

Summary Of Point 1:

A. Seizure of evidence without warrant and without consent from petitioner's bedroom dresser drawer by agents of the police violated her rights under the Fourth Amendment.

B. Petitioner's spouse had no right to waive petitioner's Fourth Amendment rights simply because he happened to be present in the house but not in the bedroom at the time of the illegal search and seizure.

C. Even if petitioner's spouse would normally be permitted to waive petitioner's Fourth Amendment rights, he should not be permitted to do so when he is the complaining witness against his spouse in a criminal charge.

A. An Agent Of The Police Seized Two Items From Petitioner's Bedroom Dresser Drawer Without A Warrant And Without Consent Or Waiver Which Were Admitted In Evidence Over Objection.

Officer Cerone, the investigating detective, discussed the planned searches and seizures with the petitioner's husband. (A. 5) Petitioner was in custody at that time. (A. 5-6, 11) Officer Cerone thought it was a good idea (A. 13) and that he would rather have somebody from the family pick up the items sought. Somebody from the family would be preferable; it would not look suspicious. (A. 8)

The complainant had his sister search the house (A. 8, 10, 16, 18) and seize two small bottles from the petitioner's bedroom dresser drawer (A. 15, 16) which she turned over to the investigating officer at her home. (A. 5, 6, 19) The two exhibits were admitted in evidence over objection. (A. 20, 21, 148, 149)

Fourth Amendment rights against unreasonable searches and seizures are personal rights which only the possessor could waive by word or deed, either directly or through an agent. *Stoner* v. *California*, 376 U.S. 483, 489; *State* v. *Matias*, (Supreme Court of Hawaii, 1969), 451 P. 2d 257.

The classic definition of waiver is "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464. Clearly,

petitioner did not intentionally relinquish or abandon her right of privacy in her bedroom dresser drawer where she kept her negligees and lingerie. (A. 10, 16, 18) It was not even *known* to her that that area of her privacy was being invaded. It took place behind her back, without her knowledge, while she was in police custody. (A. 5-6, 11)

The question remains whether petitioner waived her Fourth Amendment rights through an agent. The record reveals that she did not. She did not give consent. (A. 5) Her sister-in-law seized the two small bottles complained of from petitioner's bedroom dresser drawer, acting upon the directions of the investigating officer that "somebody from the family would be preferable; it would not look suspicious." (A. 8) Suspicious to whom? Obviously not the petitioner. She was in custody. (A. 5-6, 11) The officer must have meant suspicious to a court of law on a motion to suppress. Be that as it may, when the sister-in-law seized the two bottles and then turned them over to the investigating officer at her home (A. 6, 12, 18-19), she was acting as his agent. She was an agent for the police; not an agent for the petitioner. Even if that proposition is not acceptable, there is no reasonable theory under which she could be construed as an agent for the petitioner.

The court below stated that the complainant had a right to search his own apartment and to permit his sister to search in his presence. (App. 3a) The record shows that the complainant did *not* search the apartment. (A. 8, 10, 11) Nor was he present when his sister allegedly found the two small bottles. "I wasn't present in the room when she found these items. I was in the

other room when she was searching." (A. 12) Petitioner's argument that the complainant and his sister were acting as agents for the police was ignored by the court below.

B. A Spouse Has No Authority To Bind The Absent Spouse By Waiving A Legal Warrant And Agreeing Or Consenting To An Unauthorized Search Of Premises Jointly Occupied By Both.

This question has never been decided by this Court. It was expressly reserved in *Amos* v. *United States*, 255 U.S. 313, 317 (1920). Since that time a dichotomy has developed in which the highest reviewing courts of several States and various Courts of Appeal are poles apart. The majority view is that a spouse has no authority to bind the absent spouse by waiving a legal warrant and consenting to an unauthorized search; the minority view is that where premises are jointly owned or occupied, the freely given consent of one spouse to a search of the premises is sufficient to waive the constitutional immunity of the other. See 31 ALR 2d 1091 *et seq.*

For fifty years the dichotomy has raged. Apparently, it will not be resolved until this Court speaks upon the subject.

Should your Honors take this issue for decision, we respectfully suggest that the majority view makes better sense. The minority view, which the court below adheres to (App. 3a-4a), is at war with the juridical philosophy of this Court enunciated in *Jones* v. *United States*, 362 U.S. 257, 266-267:

> "• • • it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle

> distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. * * * (W)e ought not to bow to them in the fair administration of the criminal law. To do so would not comport with our justly proud claim of the procedural protections accorded to those charged with crime."

Under recent decisions of this Court regarding the nature of Fourth Amendment rights, it seems to us to be a foregone conclusion that when this Court finally decides the issue the majority view will be adopted. We say that because Fourth Amendment rights are personal rights which only the possessor thereof may waive or assert. "For the Fourth Amendment protects people, not places." "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." *Katz* v. *United States,* 389 U.S. 347, 351, 359. Fourth Amendment rights are personal rights. *Simmons* v. *United States,* 390 U.S. 377; *Mancusi* v. *DeForte,* 392 U.S. 364. They may not be vicariously asserted. *Alderman* v. *United States,* 394 U.S. 165, 174. It seems to follow logically that they may not be vicariously defeated.

If a right that is personal to one person may be waived by another person, no matter who that person may be, then that right simply is not a personal right.

If the right of one person is left to the unfettered discretion of another, the right would soon disappear.

And that is true regardless of how wholesome the discretion of the other may be.

C. Where One Spouse Is The Complaining Witness Against The Other Spouse, The Complaining Spouse Should Not Be Permitted To Waive The Fourth Amendment Rights Of The Other.

All of the points and authorities in the preceding presentation apply here, with the added factor of hostility and antagonism. We can think of no better way to lose a personal right than to leave it to the unfettered discretion of an angry spouse. See *Kelley* v. *State*, (Supreme Court of Tennessee, 1946), 197 S.W. 2d 545.

2.

PETITIONER WAS NOT PROVEN GUILTY OF ATTEMPT MURDER BEYOND A REASONABLE DOUBT.

In the case of *In re Winship* (1970), ... U.S. ....., 25 L. Ed. 2d 368, 375, your Honors held:

> "Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

The statute under which petitioner was convicted requires proof of the specific intent to kill.[1]

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[1] 8-1. § 8-4. Attempt.) (a) Elements of the Offense.

A person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense.

(b) Impossibility.

It shall not be a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the offense attempted.

(c) Penalty.

• • •

(1) the penalty for attempt to commit • • • murder • • • shall not exceed imprisonment for 20 years.

• • •

Count 2 of the indictment charged a specific intent to kill.(2)

Petitioner's plea of not guilty denied each and every material allegation in the indictment. She testified in her own behalf and denied administering any poisonous substance to her husband; and denied putting any poisonous substance in any edibles that she brought to him at the VA Hospital. (A. 154) There was no direct evidence of intent; the entire case was circumstantial. Therefore, it was incumbent upon the State to present evidence from which the specific intent to kill could be inferred.

The logical way to show a specific intent to kill is to present evidence that the accused attempted to administer a dose of poison that would be fatal upon ingestion. That would require evidence as to what constituted a fatal dose of the poison involved. There is absolutely no evidence of either in this record.

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(2) Count 2:

The Grand Jurors chosen, selected, and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid present that on May 24th, 1966, at and within said County, Mary B. Koshiol committed the offense of attempt, in that she, on or about the date heretofore set forth and for some time prior thereto, with the intent to commit the offense of murder, intentionally and knowingly attempted to kill John Koshiol without lawful justification, by administering to said John Koshiol and causing him to take, without his consent, a deadly poison, a more complete and accurate description of which is to the Grand Jurors unknown, in violation of Chapter 38, Section 8-4, of the Illinois Revised Statutes 1965, contrary to the Statute, and against the peace and dignity of the same People of the State of Illinois.

The Court Below Ignored The Fact That There Is Absolutely No Evidence In This Record From Which The Specific Intent To Kill Could Be Inferred.

Dr. Pierre, the State's forensic hematologist, testified that a person could ingest one to two milligrams of arsenic trioxide every day of life *without* it being fatal. (A. 58) He was never asked what constituted a fatal dose of arsenic trioxide. One of the medical authorities that he consulted prior to trial (A. 60) holds that 100 milligrams constitutes a fatal amount.[3] All of the medical authorities on the subject hold that a fatal dose is at least 100 milligrams.[4] None of the State's Exhibits contained even half that amount.[5]

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[3] Goodman & Gilman "The Pharmacological Basis of Therapeutics." holds that 100 milligrams is a fatal dose. (p. 741.)

[4] All of the medical authorities have at least one thing in common; they all agree that the amount of arsenic found in People's Exhibits 9, 11, and 12 is far less than a fatal or lethal dosage. Brooks & Jacobs "Poisons" (1958): "the lethal dose of most arsenic compounds varies from 100 to 500 milligrams." (p. 54) Osol-Farrar-Pratt "The Dispensatory of the United States of America 1960 Edition"; "100 milligrams or more." (p. 110) Gonsales, Vance, Helpern, and Umberger "Legal Medicine-Pathology and Toxicology" (1954): "The fatal dose of inorganic arsenic compounds is difficult to determine, but most authorities have considered that 3 gm. (3000 milligrams), approximately 200 grains, if absorbed into the system would kill a man of average weight." (p. 741) Sollman, "A manual of Pharmacology" 8th Ed. Saunders 1957: "Of the trioxide, 5 to 50 milligrams are toxic; 0.1 to 0.3 Gm (100 to 300 milligrams) is usually fatal; but recovery may occur after much larger quantities." (p. 1203) Taylor's "Principles and Practice of Medical Jurisprudence" 12th Ed., Simpson 1965: "The fatal dose in an adult is usually stated as from 2 to 3 grains (120 to 180 milligrams)." (p. 311) Gradwohl's "Legal Medicine" 2d Ed., Camps 1968: "In the normal person 200-300 milligrams arsenic trioxide has been considered a fatal dose." (p. 631)

[5] People's Exhibit 12, a milkshake, contained 10 milligrams of arsenic trioxide. People's Exhibit 9, a milkshake, contained 45.4 milligrams of arsenic trioxide. People's Exhibit 11, an orange, contained 3.425 milligrams of arsenic trioxide. (A. 132-134)

Thus, there is a total failure of evidentiary support. There is literally no evidence from which the specific intent to kill could be logically inferred.

The Instant Decision Conflicts With Pervading Principles Of Several Decisions Of This Court.

The court below suggests that any administering or attempt to administer any amount of any poison is sufficient to establish the specific intent to kill. (App. 5a-6a)

Of course that is not true. In *Gregory* v. *Chicago*, 394 U.S. 111, the opinion of the Supreme Court of Illinois "suggested" that the petitioners were convicted because of their refusal to obey a police officer's order to disperse. The disorderly conduct conviction was reversed because neither the ordinance nor the charge defined disorderly conduct as the refusal to obey a police order. (394 U.S., at 112) The analogy at bar is inescapable. Neither the statute nor the charge in Count 2 permits conviction of Attempt Murder except upon proof of the specific intent to kill.

In *Thompson* v. *Louisville*, 362 U.S. 199, "Shufflin' Sam" patting his feet and shuffling in time to the music of a juke box, and then asking the police officers what they were arresting him for was not sufficient evidentiary support for a conviction of disorderly conduct.

The peaceful march in *Gregory* v. *Chicago*, 394 U.S. 111, was not disorderly conduct.

In the case at bar, without regard to the integrity of the State's Exhibits and affording the State's evidence its full evidentiary value, there is literally no evidence from which the specific intent to kill could be inferred. See also *Garner* v. *Louisiana*, 368 U.S. 157, 163-164.

Although petitioner denied administering or attempting to administer any poisonous substance to her husband (A. 154), proof of the fact that he was suffering from chronic arsenic intoxication (A. 58) was an evidentiary basis from which the jury *could* have found petitioner guilty of Aggravated Battery(c) as charged in Count 1 of the indictment. (A. 2) Also the three State's Exhibits which contained far less than a fatal dose of arsenic trioxide, are an evidentiary basis from which the jury *could* have found petitioner guilty of Attempt Aggravated Battery, a lesser included offense.

But, Count 1 was not before the jury. It had been dismissed. (A. 148, 150) All that remained was Count 2, Attempt Murder. The State's evidence was in. There was no evidence of an attempt to administer a fatal dose of arsenic trioxide. There was no evidence as to what amount of arsenic trioxide constituted a fatal dose.

Essentially, the jury convicted petitioner of a crime not charged. And that is a denial of due process of law. *Cole* v. *Arkansas*, 333 U.S. 196, 201; *De Jonge* v. *Oregon*, 299 U.S. 353, 362.

(c) 12-4. Aggravated Battery

• • •

(c) A person who administers to an individual or causes him to take, without his consent or by threat or deception, and for other than medical purposes, any • • •, poisonous, • • • substance commits aggravated battery and shall be imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 5 years.

3.

PETITIONER WAS DENIED A FAIR TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS DURING AN ARGUMENT TO THE JURY WHEN THE PROSECUTORS REPEATEDLY MADE STATEMENTS OF FACT NOT BASED UPON THE EVIDENCE.

Dr. Pierre, the State's forensic hematologist, testified that a person could ingest one to two milligrams of arsenic trioxide every day of life *without* it being fatal. (A. 58)

Ten times during argument to the jury the prosecutors misquoted their own expert witness and deceived the jury into believing that one to two milligrams of arsenic trioxide is a fatal dose:

> "Dr. Pierre testified . . . that if a person received one to two milligrams of arsenic it would be fatal, dead, like that." (A. 173)
>
> "Dr. Pierre . . . one to two milligrams if taken would prove to be fatal." (A. 174)
>
> "Recall what Dr. Pierre said, one, two milligrams, fatal." (A. 177)
>
> "Dr. Pierre testified one to two milligrams would be fatal, would cause your death." (A. 179)
>
> "One to two milligrams fatal." (A. 179)
>
> "Dr. Pierre said that from one to two milligrams of arsenic trioxide is fatal to the person receiving it." (A. 215)
>
> ". . . all it takes is one to two to kill." (A. 215)
>
> "They (containers) contain enough to kill." (A. 211)
>
> "Maybe once, maybe once, but not twice, and not three times and not eighteen milligrams which would have killed John Koshiol, if possible, forty times." (A. 220-221)

> ". . . and there is no doctor from Mayo Clinic . . . who is going to come in court and put his license on the line to lie to you people." (A. 223)

In an unbroken line of cases from January, 1891, to November, 1963, the Supreme Court of Illinois held that it is reversible error for a prosecutor to state facts not proved by the evidence, or otherwise to get before the jury that which amounts to his own testimony. (*Raggio* v. *People*, 135 Ill. 533 (1891); *People* v. *King*, 276 Ill. 138 (1916); *People* v. *Black*, 317 Ill. 603 (1925); *People* v. *Rothe*, 358 Ill. 52 (1934); *People* v. *Weitsman*, 362 Ill. 11 (1935); *People* v. *Dukes*, 12 Ill. 2d 334 (1957); *People* v. *Beier*, 29 Ill. 2d 511 (1963).)

Petitioner's argument based upon that authority was ignored. The court below held:

> Finally, we find that the prosecutor's final argument to the jury was not prejudicial to the defendant. While certain remarks may have been improper, though unobjected to in the trial court, nevertheless, in view of the clear and convincing evidence of the guilt of defendant we do not believe that the remarks could have influenced the result, or that the verdict could have been otherwise had the statements not been made. *People* v. *Naujokas*, 25 Ill. 2d 32. (App. 7a-8a)

In the first place, why didn't the court below spread the "improper remarks" of record in the opinion? This is an "escape hatch" built into the opinion so that legal scholars will not see the enormity of the court ignoring 79 years of its own case law.

In the first place, why didn't the court below spread the "improper remarks" of record in the opinion? This trial by an impartial jury under the Sixth Amendment.

Third, *People* v. *Naujokas* is not in point. The court below twists it into point by transposing our complaint into one of "prejudicial argument" instead of what it is —"statements of fact not based upon the evidence". In *Naujokas*, the prosecutor called the accused "alley-wise" and contended that the defendant "has been proved a liar, a thief and a robber." That is not the same as repeatedly stating a fact not proved by the evidence.

It seems to us that such unequal administration of the State's own case law amounts to a denial of equal protection of the laws. (*Yick Wo* v. *Hopkins*, 118 U.S. 356) But, more important are the due process considerations.

As we see it, the synoptic phrase "due process of law" embraces every phase of human intercourse from the beginning of time to the present split-second. Boiled down to its truest essence it means "fairness", "fair trial."

If it is unfair to convict a person without evidence of guilt (*Gregory* v. *Chicago*, *Thompson* v. *Louisville*), it seems doubly unfair to secure a conviction by deceiving a jury into believing that there is evidence of guilt in the record when there is not.

Moreover, when a prosecutor makes statements of fact not proved by the evidence, he is insulated against cross examination, and another constitutional right is denied the accused; the right of confrontation guaranteed by the Sixth Amendment.

4.

ERROR IN AN INSTRUCTION GIVEN OVER OBJECTION DENIED PETITIONER A FAIR TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS.

Petitioner was charged with the offense of attempt murder, a specific intent offense. But, by virtue of a faulty instruction, the jury was invited to convict the petitioner even in the absence of specific intent to kill.

State's Instruction No. 1, given over objection (A. 156), reads as follows:

> "The court instructs the jury, in the language of the statute, that a person who kills an individual without lawful justification, commits murder, if in performing the acts which cause the death he knows that such acts create a *strong probability* of death *or great bodily harm* to that individual or another." (A. 225, emphasis supplied.)

In Illinois, Murder is a general intent offense[7] as distinguished from Attempt Murder which is a specific

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[7] 9-1. § 9-1. Murder.] (a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or

(3) He is attempting or committing a forcible felony other than voluntary manslaughter.

(b) Penalty.

A person convicted of murder shall be punished by death or imprisonment in the penitentiary for any indeterminate term with a minimum of not less than 14 years. If the accused is found guilty by a jury, a sentence of death shall not be imposed by the court unless the jury's verdict so provides in accordance with Section 1-7(c) (1) of this Code.

intent offense. A definitive instruction on Murder should have been limited to a portion of 9-1 (a) (1) as follows—

> "The court instructs the jury, in the language of the statute, that a person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death, he • • • intends to kill • • • that individual • • •"

—otherwise the jury is free to convict upon a finding merely that there was an intent to commit great bodily harm.

That is precisely the evil complained of at bar. The instruction given over objection, permitted the jury to select either mental state. And it is impossible after conviction to determine which mental state the jury selected, the right one or the wrong one. If the jury found an intent to commit great bodily harm, petitioner was entitled to a verdict of not guilty because of failure to prove the specific intent to kill.

Where the error is so fundamental as not to submit to the jury an essential ingredient of the offense, it is a denial of petitioner's Sixth Amendment right to trial by an impartial jury and her right to a fair trial under the Due Process Clause of the Fourteenth Amendment. See *Screws* v. *United States*, 325 U.S. 91, 107.

CONCLUSION.

From the above and foregoing several premises petitioner prays that your Honors will adjudge her complaints to be of sufficient constitutional magnitude to warrant this Court's review on writ of certiorari.

Respectfully submitted,

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APPENDIX

Opinion Of The Supreme Court Of Illinois

Docket No. 41700—Agenda 13—March, 1970.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, vs.
MARY B. KOSHIOL, Appellant.

MR. JUSTICE CREBS delivered the opinion of the court:

Defendant, Mary B. Koshiol, was tried by a jury in the circuit court of Cook County on a two-count indictment charging aggravated battery and attempted murder of her husband, John Koshiol. At the close of the State's evidence the aggravated battery charge was dismissed, but she was found guilty of "attempt murder" and sentenced to the Women's Prison at Dwight for a term of not less than 2 years nor more than 6 years. She now appeals from this conviction and sentence claiming that her constitutional rights were violated by an unlawful search and seizure at the apartment she and her husband jointly occupied, that the evidence was insufficient to prove her guilt, that the final argument of the prosecutor was prejudicial, and that the court erred in instructing the jury.

Defendant and her husband were married for 18 years and lived together with their four children in an apartment in Chicago. Mr. Koshiol testified that in September, 1965, he began suffering painful vomiting spells which continued periodically during the following months of that year and then recurred during the first three months of 1966. After three separate confinements in private hospitals failed to reveal the cause of his trouble he was transferred to a

Veteran's Administration Hospital on March 8, 1966, where an expert in blood disorders diagnosed his illness as chronic arsenic intoxication. Suspicions were aroused that his wife was putting arsenic in his food when he recalled that on each confinement in the hospital his vomiting would stop and then reoccur when he returned home. When he vomited in the Veteran's Hospital on March 12 after drinking a milk shake which defendant had brought to him he was restricted to the hospital diet alone and all subsequent gifts of food or drink from his wife were turned over to the hospital for checking. From this time on his vomiting stopped. In the hospital check a number of items delivered to her husband by defendant proved negative for arsenic content, but toxicology experts testified that a milk shake delivered on April 5 contained 10 milligrams of arsenic trioxide, another delivered on April 15 contained 45.5 milligrams, and an orange delivered on April 21 contained 3.425 milligrams.

Defendant was arrested on May 24 in her husband's hospital room. On June 1, while defendant was in custody, her husband was released from the hospital for the day to arrange for a woman to take care of his children. His sister testified that she came to help and while removing defendant's clothes from a dresser drawer she found two bottles, one of which was later found to contain arsenic. She then searched further and found a syringe needle and another bottle in the bathroom which contained arsenic. Defendant's son also testified that he found a bottle in the kitchen pantry which was later determined to contain arsenic.

Defendant contends first that the rights against unreasonable search and seizure under the fourth amendment to the United States constitution are personal to the pos-

sessor and that a spouse should have no authority to bind an absent spouse by waiving a legal search warrant or consenting to an unauthorized search of premises jointly owned or occupied by both. She recognizes that the United States Supreme Court has never expressly ruled on this subject and that the long established rule in Illinois is contrary to her position. (*People* v. *Shambley*, 4 Ill. 2d 38; *People* v. *Perroni*, 14 Ill. 2d 581; *People* v. *Speice*, 23 Ill. 2d 40; *People* v. *Stacey*, 25 Ill. 2d 258; *People* v. *Palmer*, 26 Ill. 2d 464; *People* v. *Palmer*, 31 Ill. 2d 58; *People* v. *Haskell*, 41 Ill. 2d 25.) However, she argues that we should reconsider the matter on the grounds that a personal right which can be waived by another either directly, or indirectly as an agent, thereby loses its personal status and the right itself would soon disappear. We disagree, particularly under the facts of this case. The husband was not acting as an agent of his wife, nor was he waiving his wife's right in permitting his sister to conduct a search of his own apartment in his presence. Rather, he was exercising his own personal right of possession and control to which he was entitled as a joint owner and occupant of the premises. To hold otherwise here would lead to the strange conclusion that the right of the wife to conceal her efforts to kill her husband are paramount to and somehow must supersede her husband's equal right to protect himself by searching his own residence for the physical evidence of his wife's activities. Defendant cites no reason why such a search by her husband was unreasonable other than that his position was antagonistic to her and his whole attitude was contrary to her best interests. That he was antagonistic at this point is true, but it surely constitutes an anomalous argument under the circumstances. In any event, regardless of the alleged antag-

onism on the part of the husband, it neither depleted his right nor increased his wife's. Defendant makes one further argument that the rule as it now stands represents a challenge to the Judeo-Christian community at large because it discourages marriage and encourages immorality in that the right against unreasonable search under such rule is allegedly secure against a person's part-time paramour and is lost against a person's wedded partner. She asks if one of the prices of marriage is an abandonment of rights under the fourth amendment. We consider this argument entirely spurious. The right to search or to consent to a search is based on the right to the use or occupancy of the premises and not on the relationship of husband and wife as opposed to that of man and paramour.

For the reasons stated we find no reason to change our position with respect to the principle set forth in *People* v. *Shambley*, 4 Ill. 2d 38, and we expressly reaffirm such principle and find that the search and seizure herein was both reasonable and lawful.

Next, defendant contends she was not proved guilty of the offense of attempt to murder because there was no evidence of a specific intent to take her husband's life, nor any evidence that the amount of arsenic in the food she brought him was sufficient to kill, and, further, since the charge of aggravated battery was dismissed it was logically and legally impossible to convict her of attempt to murder which involved a second simultaneous specific intent. In answer to the last of these contentions attention need only be called to the fact that the trial court dismissed the aggravated battery charge for the reason that the first count of the indictment, charging aggravated battery, failed to allege that

defendant intentionally or knowingly caused great bodily harm to another as required by statute (Ill. Rev. Stat. 1967, ch. 38, par. 12—4). To the contrary, the count charging attempt to murder did charge intent. Therefore, the dismissal of the first count had no effect on the second.

As to the question of the sufficiency of proof of specific intent the law is well settled that intent is a state of mind, and, if not admitted, can be shown by surrounding circumstances, and intent to take a life may be inferred from the character of the assault, the use of a deadly weapon and other circumstances. (*People* v. *Shields*, 6 Ill. 2d 200.) Also, "Since every sane man is presumed to intend all the natural and probable consequences flowing from his own deliberate act, it follows that if one wilfully does an act, the direct and natural tendency of which is to destroy another's life, the natural and irresistible conclusion, in the absence of qualifying facts, is that the destruction of such other person's life was intended." (*People* v. *Coolidge*, 26 Ill. 2d 533, 537.) Here the evidence is clear that at first defendant's husband experienced his vomiting attacks only when residing at home and not when confined to the hospital, that his condition was eventually diagnosed as chronic arsenic intoxication, that arsenic was found in the home of defendant and her husband, that on three occasions defendant had visited him in the hospital and had given him two milkshakes and an orange, each of which contained arsenic trioxide varying in amounts from 3.425 milligrams to 45.5 milligrams. The conclusion from these facts, otherwise unexplained, is inescapable that defendant intended to kill her husband.

As to the question of the sufficiency of the arsenic to kill, one expert testified that the dose a person could take

each day without being fatal would be between one or two milligrams on a continuance basis. Section 8—4 of the Criminal Code (Ill. Rev. Stat. 1967, ch. 38, par. 8—4), that a person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense. We find that the giving of three specific articles of food on separate occasions, containing arsenic, together with the reasonable inferences to be drawn from the other surrounding circumstances above set forth, are more than sufficient to constitute a substantial step toward the commission of the offense of murder.

Defendant next objects to two instructions given for the State. One instruction set forth the statutory definition of the crime of murder and then concluded with the statutory definition of the crime of attempt to the effect that a person commits the latter offense "when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense." Defendant argues that it makes no sense to give a definitive instruction on murder in a case in which no one was killed, that it only tends to confuse and mislead the jury. To the contrary, it would seem utterly meaningless to instruct a jury on attempt to commit a "specific offense" without defining the specific offense alleged to have been committed. Such procedure would leave the jury entirely to its own devices in determining what specific offense the court was referring to in its definition of attempt as well as in determining whether the defendant had taken a substantial step towards its commission. We find no error in the instruction given.

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The other instruction complained of is one stating that proof of motive is not required. Defendant admits that such an instruction is proper under prevailing law but argues that there is no valid reason for such an instruction, that it only tends to confuse the jury since motive or lack of motive is not proof of guilt or innocence. She argues specifically that since it was brought out on cross-examination of defendant that there was a life insurance policy on her husband the instruction could mislead the jury into believing that this portion of the State's case could be inferred and need not be proved beyond a reasonable doubt. In support of her claim she cites the Committee on Illinois Pattern Instructions (I.P.I. Criminal No. 3.04) which suggests that a motive instruction may be improper in a case in which the prosecution introduced evidence of motive. We do not believe that under the circumstances of this case such instruction constituted error. If inability to discover a motive for a crime is not a basis for acquittal then it follows that an unsuccessful attempt to prove motive should likewise not be a controlling factor, and, in either instance, the jury is entitled to know that proof of motive is not essential to proof of guilt so as not to be misled otherwise. In any event, motive was merely one factor among many to be considered by the jury and we find that no prejudice to the defendant resulted from giving the disputed instructions.

Finally, we find that the prosecutor's final argument to the jury was not prejudicial to the defendant. While certain remarks may have been improper, though unobjected to in the trial court, nevertheless, in view of the clear and convincing evidence of the guilt of defendant we do not believe that the remarks could have influenced the result, or

that the verdict could have been otherwise had the statements not been made. *People* v. *Naujokas*, 25 Ill. 2d 32.

The judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Mr. JUSTICE WARD took no part in the consideration or decision of this case.